

# International Exchange of Information in Criminal Cases

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## INTRODUCTION

Obtaining information from abroad in criminal cases poses many of the same problems as obtaining the defendant himself. The parallels are, with only slight exaggeration, simply stated. A treaty that imposes reciprocal obligations upon the signatories to render requested data is analogous to an extradition treaty. Deportation resembles the unilateral decision of a foreign sovereign to send data out of the country to a particular place.<sup>1</sup> Defendants are sometimes kidnapped across international frontiers,<sup>2</sup> and information is sometimes obtained by means beneath the law, often without the consent of the sovereign from whose territory the information is taken.

Exchange of information may implicate the concerns of more people than a decision to render a defendant. The suspect worries, for lurking in the records of a foreign bank may be evidence of crime strong enough to take the government's case to the jury. For the foreign banker, a request for information puts him in the center of a conflict between the laws that govern bank secrecy in his country, the wishes of his depositor, and the demands of his own and another sovereign. For the state within which the information lies, foreign requests pose difficult problems of sovereignty and comity. The requesting state faces similar problems, often overshadowed by an urgent desire to get the information at almost any cost.

This picture of international information exchange is beclouded when the prosecutor or police official seeking the information decides to shortcut official procedures. In perhaps the most famous such case, Bahamian bank

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\* Tigar, Buffone & Doyle, P.C., Washington, D.C. We acknowledge the assistance of John J. Privitera, of our firm, and of many lawyers in various parts of the world who have helped us. We cannot name many of those whose help has been essential to our efforts, because to do so might reveal attorney-client or attorney work-product information. For the same reasons, some references in this article to cases or procedures are set in general terms.

secrecy laws had for years frustrated Internal Revenue Service and Justice Department efforts to obtain financial information about Americans suspected of evading taxes through the use of offshore banking connections. Despairing of ever convincing Bahamian officials to order bankers to disclose files to the United States authorities, enterprising government agents waited until a Bahamian bank official was visiting Miami, burgled his hotel room in his absence, rifled his briefcase, photographed the contents, and then used the information obtained in a host of civil and criminal tax cases.<sup>3</sup> Similar tales abound.<sup>4</sup> And whatever American courts may decide about the use of evidence so obtained, the foreign government whose secrecy laws are evaded by such means may feel that its sovereignty has been invaded.<sup>5</sup>

In this article, we describe some of the means by which police and prosecutors obtain information in international criminal matters. We do not present an exhaustive catalog; rather, we dwell upon examples of international cooperation and conflict to illustrate the need for systematic development of international law principles governing the interpretation and application of treaties, and the enforcement in both the demanding and the rendering state of rules concerning information exchange. These rules and principles should honor expectations of privacy and confidentiality, make clear the obligations of foreign persons and entities, including financial institutions, and ensure mutual respect for the sovereign interests of the rendering state and the enforcement jurisdiction of the demanding state. We consider, as cases in point and as representative examples, the treaties of mutual assistance between the United States and Switzerland, the use of subpoena power in the United States to reach foreign persons, entities, and information, and the array of covert devices used by American authorities when neither a treaty nor compulsory process promises any assistance.<sup>6</sup>

To put our discussion in perspective, we should identify the kinds of criminal investigations in which international exchange of information is likely to be useful. First, the Foreign Corrupt Practices Act<sup>7</sup> has naturally prompted such investigations. Since the passage of the Act, Justice Department attention has focused upon a number of companies whose foreign operations have allegedly been assisted by payments to foreign officials. Even pre-Act foreign payments have been challenged under a number of theories.<sup>8</sup> Often, these foreign payments are made by bank transfer in countries such as Switzerland, where bank secrecy laws are thought to provide confidentiality. If the company does not transfer funds directly to the foreign official, but rather through intermediaries, the rights of the bank, the intermediary, and the suspects may all be judged by different standards. Possessed of evidence that a payment has been made, how can the Justice Department obtain the bank records to prove its case? What

rights to notice do the bank's customers and the suspected payor and recipient have? When, in what country, and before what tribunal may the rights of these parties be asserted?

Or consider the case of an American company or individual that uses a foreign bank account, in Switzerland, the Cayman Islands, or some other place with bank secrecy protection, perhaps for financial privacy and perhaps as a means of storing unreported income. The government, unable to obtain this information under a treaty, serves a subpoena on an American subsidiary or affiliate of the foreign banking institution, and simultaneously serves the American entity or individual with a demand that it consent to release of the records. What are the rights and responsibilities of the various parties, and before what tribunal may they assert them? If the government is frustrated in its effort to obtain information by these means, what risks does it run by suborning a foreign bank official, stealing the documents in a foreign country, or otherwise resorting to self-help?

Finally, consider the case of a company executive subpoenaed to testify before a grand jury about alleged unlawful acts by the company or a foreign subsidiary overseas. The executive invokes his privilege against self-incrimination and is granted immunity. He persists in refusing to testify, asserting that there remains a substantial risk of prosecution in the foreign country, which cannot be attenuated by the United States court's grant of immunity. How strong must the likelihood of incrimination be in order to sustain the claim? Is it appropriate for American prosecutors to try to persuade foreign officials to abandon their possible interest in prosecuting the executive, so as to moot the claim of "foreign self-incrimination"?

All of these cases have occurred, with nearly endless variations, over the past several years. Let us examine them in different contexts.

## TREATIES BETWEEN THE UNITED STATES AND SWITZERLAND

Two treaties between the United States and Switzerland provide excellent examples of bilateral information exchange agreements: <sup>9</sup> the income tax treaty of 1951 and the 1973 treaty on mutual assistance in criminal matters. The tax treaty has been extensively and authoritatively discussed in several law journals, <sup>10</sup> and need not detain us greatly. The 1973 treaty, however, is proving to be an important and powerful weapon in the Department of Justice arsenal, and little has been written in the United States about the rights it does and does not confer. <sup>11</sup>

### The Swiss Law Background

Swiss law has for some time guaranteed the privacy of banking transactions, even those of foreign depositors. The Swiss concept of privacy extends to financial affairs, and is an integral part of certain contractual relations, such as that between a bank and its depositors or other creditors.<sup>12</sup> The concern with privacy of banking relations is easy to understand: it fosters the growth of Swiss banking institutions. It provides a neutral principle of nondisclosure that appears to reinforce the Swiss posture of diplomatic neutrality. Indeed, Nazi efforts to pursue the assets of Jewish depositors in Switzerland led directly, as one commentator has noted, to the enactment of criminal laws to supplement the existing civil liability for breach of bank secrecy.<sup>13</sup>

The Swiss Penal Code also contains provisions prohibiting disclosure of business secrets; these provisions have been interpreted to bar disclosure to foreign fiscal authorities.<sup>14</sup> Article 47 of the Swiss Federal Banking Law provides for punishment by fine and imprisonment of a bank employee or agent who intentionally discloses a secret entrusted to him in such capacity.<sup>15</sup> Solicitation of such an act is also punishable, and regulatory authorities are included in the list of persons subject to the obligation of secrecy. Article 47 exempts from its prohibition disclosure under cantonal and federal laws relating to the duty to testify or give evidence. To some extent the treaties between the United States and Switzerland also override the bank secrecy law.

In spite of its prohibitions to protect bank secrecy, Swiss law does not elevate bankers to the status of doctors, lawyers or clergy. They have no evidentiary privilege in civil or criminal cases to refuse relevant testimony or documentary evidence to a Swiss federal tribunal, although some cantonal codes recognize such a privilege. In administrative matters, bankers may generally refuse to disclose business secrets entrusted to them by depositor-creditors.<sup>16</sup> This administrative protection extends to tax matters, during the assessment and civil penalty phases of a tax investigation. When tax *fraud*—akin to felony tax evasion under United States law—is at issue, the criminal procedure rules may come into play and the banker is obliged to give evidence.<sup>17</sup>

This necessarily brief and general recital suggests that questions of financial disclosure implicate deep-seated concerns of Swiss authorities. It is hardly surprising, therefore, that the bilateral treaties between the United States and Switzerland were concluded only after lengthy discussions, and that the Swiss commentaries on the treaties have continued to stress the limitations on production and use of evidence, returning often in discussion to the concerns of the financial community.<sup>18</sup>

### The Swiss-United States Income Tax Treaty

Switzerland is party to a large number of bilateral tax treaties, as well as to the OECD tax convention.<sup>19</sup> The dominant purposes of these treaties are to prevent double taxation and to protect the revenue of the signatories. Swiss courts have held that exchange of information with respect to the subjects covered by a tax treaty is an implicit obligation of the treaty itself.<sup>20</sup> Thus, the absence of an express information exchange provision is no bar to exchange of information relating to rights and obligations created or defined by the treaty itself.

The Swiss income tax treaty with the United States goes farther than any other, and contains an express provision permitting the Americans to obtain information necessary to prevent fraud against American income tax laws.<sup>21</sup> The provision, not surprisingly, has proven controversial among financial circles in Switzerland. Swiss courts will, however, refuse aid under the treaty if the particular American tax provision sought to be enforced is regarded as confiscatory and hence contrary to the *ordre public*.<sup>22</sup> But when American authorities present substantial evidence of run-of-the-mill tax fraud schemes, the Swiss courts will give the treaty a fair, not to say liberal, interpretation.<sup>23</sup>

There are, in practice, a number of practical limitations upon the apparent generosity of the United States-Swiss income tax treaty. The first is that the information collected in Switzerland is often furnished to American authorities in a form not susceptible of being introduced in evidence.<sup>24</sup> Thus, the American authorities may be in the position of having verified facts that they are in no position to prove.<sup>25</sup>

The second limitation arises from the principle of specialty,<sup>26</sup> which restricts the uses to which information may be put by the demanding state. The Swiss view has consistently been that information exchanged under a treaty may be used only for the purposes for which it was obtained, and in compliance with the conditions of the treaty.<sup>27</sup> Thus, information obtained under a general tax treaty may not be used for prosecution of fiscal law violations, such as failure to observe reporting requirements, and information obtained under the United States-Swiss treaty for prevention of revenue fraud must be used strictly in accordance with the limits set out in the treaty and not to investigate or prosecute other than tax fraud offenses.<sup>28</sup>

The income tax treaty, and particularly recent applications of it,<sup>29</sup> have been useful to American prosecutorial interests. However, the preferential treatment given to the United States has already caused controversy in Switzerland. Perhaps more important, American concerns are broader than simply selected revenue violations. With the growing federal prosecutorial interest in white collar crime and the financial transactions of multination-

al corporations, the Americans sought to cast a broader net by negotiating the 1973 treaty.

### **The Swiss-United States Treaty on Mutual Assistance In Criminal Matters**

#### *The Scope of the Treaty*

The treaty,<sup>30</sup> signed in 1973, did not enter into force until January 23, 1977. Thus, there is a relatively small body of precedent about its actual operation. In scope and function, however, it is relatively simple. A schedule lists the offenses for which international aid may be given. These offenses include, in addition to common law crimes, fraudulent bankruptcy, trafficking in stolen securities, falsehoods relating to the conduct of a business, perjury, some types of obstruction of justice,<sup>31</sup> gambling, and narcotics offenses.

Article 5 of the Treaty excludes, however, any offense of a political nature,<sup>32</sup> antitrust offenses and tax offenses. There is, however, an important exception to Article 5: Articles 6, 7, and 8 are "Special Provisions Concerning Organized Crime." Article 6(3) defines an "organized criminal group" as one engaged in the systematic unlawful pursuit of monetary gain, carried on through actual or threatened violent acts constituting crimes in both states, and which seeks influence or affiliation with political, labor, or employer groups.<sup>33</sup>

When the requesting state makes a case persuasive to the "central authority" of the requested state, that the request concerns organized crime, and further "reasonably concludes" that the information is not obtainable except with the cooperation of the requested state, then the requested state shall furnish assistance through compulsory measures even though the offenses involved are neither listed on the schedule of offenses nor constitute a crime under the law of the requested state.<sup>34</sup> With respect to income tax violations, however, the requesting state must meet a somewhat more stringent standard: it must show that the suspect is of a certain importance in organized crime circles, that successful prosecution is unlikely without the requested assistance and that with the requested assistance there is a reasonable assurance of successful prosecution that will put the suspect behind bars for a long enough time to have a "significant adverse effect on the organized criminal group."<sup>35</sup>

The treaty's field of application, then, reflects significant bargaining about the sorts of offenses for which assistance would be available. The organized crime provisions reflect significant concessions by the Swiss to an American concern, but the concessions are predictably limited. Only in organized crime cases can nonschedule offenses be the subject of cooperation, and then only if the criminal group is engaged in crimes which are

so defined by the laws of both states. The concession on tax law violations is the most strictly limited of all, in accordance with prior Swiss practice.

To understand the significance of the organized crime provisions of the treaty, and the reluctance of the Swiss to implement so sweeping a departure from prior practice, one need only turn to the Swiss Federal Council's message submitting the treaty to the Swiss Federal Assembly.<sup>36</sup> The Federal Council began by noting that the absence of a treaty on mutual judicial aid seriously disrupted relations between the United States and Switzerland. The Swiss, the Council continued, strove to conclude a treaty covering all aspects of judicial aid, though it was evident that organized crime "was in the first rank of American preoccupations."<sup>37</sup>

By putting the organized crime provisions in the context of a larger agreement, the Swiss evidently wanted to stress the exceptional and limited character of their concessions. The Swiss Federal Council began by noting the dangers of organized crime to government, and referred to the provisions of Articles 6, 7, and 8 as "intensified judicial assistance," based upon abnormal circumstances. After stressing the exceptional character of these provisions, the Council went on to note two significant qualifications on their exercise. The first is the nearly unreviewable power<sup>38</sup> of the Swiss federal police to determine whether the Americans have made out a case that the acts of the suspect are within the definition of organized crime. The Council pointed to the general language of Article 3, permitting refusal of aid whenever the requested state feels that cooperation might prejudice its sovereignty, security or "essential interests of a similar nature."<sup>39</sup> Second, the Council took pains to stress that the limited provision for assistance in organized crime income tax cases "is exceptional and cannot be considered a first step toward the abandonment of the principle forbidding judicial assistance for fiscal law violations."<sup>40</sup>

In short, the text and history of the part of the treaty dealing with organized crime lay bare some basic concerns of the parties. Prospects of success for the current American effort to expand the treaty must, it seems to us, be viewed with these concerns in mind.

### *Notice*

With this background, we consider a typical case in order to illustrate the operation of the treaty. The Department of Justice of the United States, through the Assistant Attorney General for the Criminal Division, addresses its request to the Swiss Federal Department of Justice and Police. In the Department's Division of International Judicial Assistance, a "Central Office USA" processes these requests.

The letter of request will typically contain a statement of facts and supporting evidence thought sufficient to bring the request within the treaty's terms. The Swiss authorities will first determine, under article 36,

who is entitled to notice of the request. The application of article 36 is uncomplicated when the subject of the investigation is also the depositor in the bank from whom records are sought. The bank will receive notice and will probably communicate with its customer if he still has an active account. Further, there seems to be no question that a suspect, who is so identified in a letter of request, is entitled to notice directly from the federal police if he has or had an account with the bank from whom records are sought. The federal police have made a practice of notifying such persons.

The problem of notice is more difficult with respect to others. If the request pertains to an individual who simply had a transaction with a depositor whose records are sought, that individual may not be given notice. Article 36(3) requires notice to a "defendant," defined to include a "suspect who is a subject of an investigation."<sup>41</sup> Certainly by the time a grand jury inquiry has proceeded far enough to permit an Assistant Attorney General to write a proper letter of request, the individual who is named in that letter falls within this definition. However, article 36 is limited to cases in which "the law in the *requested* State requires such notice." Swiss law would certainly grant standing to a suspect to challenge the sufficiency of the request before the federal police,<sup>42</sup> and to pursue judicial review of an adverse decision.<sup>43</sup> Less clear is whether Swiss law requires notice to the suspect who is not a depositor or in some other way subject to the statutory protection of Swiss banking and economic espionage law. There are certainly strong reasons of fairness for construing Swiss law as requiring such notice, although our inquiries have not disclosed a case in which such notice was given.<sup>44</sup>

Another provision of the treaty also provides for notice:

Where a request under this Article pertains to a pending court proceeding, the defendant, upon his application, may be present or represented by counsel or both, and may examine the person producing the document as to its genuineness and admissibility. In the event the defendant elects to be present or represented, a representative of the representing State or a state or canton thereof may also be present and put such questions to the witness.<sup>45</sup>

The evident purpose of this article is to satisfy admissibility requirements for certain business records that might not be received in evidence unless the defendant had an opportunity to be present when they were produced and authenticated. No similar provision appears in other articles, relating to court and official records.<sup>46</sup>

If admissibility of evidence in the United States is an important American concern, one is moved to consider whether American authorities ought, as a matter of prudence, to advise suspects of requests under the treaty. Article 12(2) grants the *requesting* state the right to see that a suspect,



his counsel or both are present during the execution of a request. If the information is sought simply for a grand jury investigation, where the rules of evidence do not generally apply, dispensing with the suspect's presence presents no disadvantages to the American authorities under present law, whatever one might think of the unfairness of such exclusion.

If the evidence is being gathered for trial purposes, American authorities must consider the hearsay rule, provisions on authentication, and the confrontation rights of the defendant.<sup>47</sup> While these problems will usually be attenuated in the business records context, they may loom large in particular cases,<sup>48</sup> for example, where the purported business record contains narrative matters arguably not made in the regular course of business. Difficulties in introducing Swiss bank records into evidence in the United States might also arise if the Swiss authorities have intervened to excise or withhold portions of records as being subject to overriding Swiss concerns with secrecy or not producible under the request. Under Article 12 of the Treaty, these decisions are made by the Swiss, who have the right to exclude the United States representatives and even the suspect and his counsel from any proceedings in which such secrets might be disclosed.<sup>49</sup>

#### *Objections to the Request and Judicial Review in Switzerland*

Continuing with the typical processing of an American request, the Central Office will rule on any objections to the request. The Central Office, in the course of making its decision, may receive written submissions from those objecting, and often requests the United States Justice Department to furnish additional information. The decision is subject to judicial review by an affected party, just like any other administrative determination dealing with personal rights.<sup>50</sup>

The process of judicial review may be long and complex. The appropriate federal tribunal will probably be the first to hear the matter. These Swiss courts have often been sympathetic to American requests under the treaty. They have been unwilling to credit assertions that the American request is pretextual, in the sense that information obtained ostensibly for one purpose will in fact be used for another. The Swiss Federal Council noted in 1981 that in the three years the treaty has been in force, there has been no reported instance of the Americans violating the principle of specialty, and that a party aggrieved by any such action would have the right to invoke the protection of the Swiss courts. The Swiss courts have been content to satisfy themselves that the request is in proper form, is internally consistent, and that the offenses cited are among those for which aid may be given.

If a party loses before the federal tribunal, the treaty provides some interesting options. Article 6 of the Swiss federal law implementing the

treaty provides for a special consultative commission with power to determine whether a request would harm the important Swiss interests referred to above. An aggrieved party may submit this limited question to the commission following an adverse decision of the federal tribunal. If the commission decides adversely, the final recourse is to the Federal Council.

While it appears that there is little hope of successfully opposing a properly-framed American request, the process of review may itself help potential defendants. In one recent case, nearly two and one-half years elapsed from the date of the request until final action by the Federal Council. Of course, the conclusion of judicial review signals only the beginning of collecting the materials requested.

### *The Process of Collecting the Information*

The process of collection presents another set of opportunities for challenging the application of the treaty to the evidence sought by the American authorities. The production of evidence in Switzerland is supervised by a designated examining magistrate, the same judicial official who is typically charged with preliminary inquiries in criminal cases. The choice of magistrate is determined by the location of the records.

Here, again, the course of events will be determined by who has notice and who shows up to participate. The magistrate may use compulsory process to obtain the requested information, and the American authorities generally have the right to participate in a hearing before the magistrate to ensure that the request is complied with and to authenticate the records produced. The Swiss federal authorities also may participate, to ensure procedural regularity, to assure that the documents produced are in fact those and only those requested, and to interpose objections based either upon the scope of the approved request or upon the terms of the treaty.

At this stage, the bank whose records are being sought is also likely to be an active participant, even if it has not opposed federal police approval of the request. Indeed, in some cases neither the suspect nor the depositor has been notified of the request—the former because of an administrative decision not to notify and the latter because it may be, for example, a defunct entity whose current status or address cannot be found. In these cases, the bank and its counsel have nonetheless taken an active interest in limiting the scope of production and ensuring formal recognition of the principle of specialty and treaty coverage.

The bank's participation is understandable, although the treaty specifically overrides any federal or cantonal law imposing an obligation of secrecy,<sup>51</sup> and would appear to provide a complete defense to civil or criminal charges of improper disclosure. The bank may well wish added assurance that the release of its records is proper. It can obtain that assurance most easily by actively participating in the collection process. It may

also wish to reassure its depositors, and the financial community generally, of its interest in maintaining the secrecy of customer transactions.

Of course, if the bank's officers know of or have participated in the conduct that is the subject of the investigation—or even fear further requests and further embarrassment—there is an added reason for participation. A treaty request might be the first stage in a government effort to unravel a complex series of transactions. The next phase could be fought out on a basis less likely to ensure secrecy. For example, the United States government might, as discussed below, subpoena the information from one of its citizens empowered to obtain it.<sup>52</sup>

#### *Using the Transferred Information in United States Courts*

It remains to ask what problems American authorities may confront in seeking to use the fruits of a treaty request in American courts. Article 37 purports to limit judicial review in the United States to a very few types of treaty violations.<sup>53</sup> One might argue that the treaty confers no rights on individuals except those granted by article 37, and that other violations of the treaty may be raised only by suing in the Swiss courts or by country-to-country negotiation and arbitration. There are reasons to doubt that review is so limited. First, the Swiss Federal Council has recognized the right of private persons to bring an action before Swiss tribunals, presumably under the administrative procedure law, if the information furnished is used by the United States in violation of the principle of speciality. This dictum is an implicit recognition that the treaty confers *individual* rights; if it does, then its command should be enforceable in the United States as well as in Switzerland.<sup>54</sup> United States courts have similarly recognized the rights of extradited defendants who object to being prosecuted for crimes other than those for which they were extradited.<sup>55</sup>

Deeper questions remain to be resolved in the administration of the treaty. First, the treaty may place on a criminal defendant the unreasonable burden of proving that a document obtained under the treaty is not genuine in order to sustain an objection on that ground. Article 18(6) purports to provide for admission of any document authenticated in accordance with article 18. One cannot object to this provision when a document is sought for use in a "pending court proceeding," as article 18 provides for the defendant's presence in such circumstances. However, in the more typical case of a document obtained during an investigation which the prosecution seeks to admit in a later proceeding, article 18 would apparently be the basis for the government arguing that the documents are admissible without the defendant ever having had the opportunity to test their admissibility under the hearsay rule or under the authentication provisions of the Federal Rules of Evidence. The last word will be that of the courts, notwithstanding any purported restriction on judicial review. The ques-

tion for decision will not be whether or not the treaty has been violated, but whether the evidence meets the minimal standards of reliability demanded by the due process and confrontation clauses of the Constitution.<sup>56</sup>

This is not a fanciful objection. Article 18 purports to establish a mechanism for authenticating documents and for establishing by testimony under oath that they are in fact business records as that term has been defined in Federal Rule of Evidence 803(6). While many if not most documents offered under this exception to the hearsay rule pose no problems, the right to cross-examine the custodian of such a document in order to determine whether it in fact meets the business records standard cannot be done away with so easily in every case. Purported business records may contain conclusions, statements which need to be seen in a larger context, or other matter that disqualifies them from admission into evidence.<sup>57</sup> The treaty cannot, consistent with the Constitution, resolve all such questions in the government's favor.

#### *The Defendant's Access to the Treaty Mechanism*

There is another, more significant problem with the treaty, and that is its one-sidedness. Only the government is given the means to override Swiss bank secrecy laws and obtain the information it defines as necessary to the *prosecution* of individuals it selects. Suppose an actual or potential defendant should conclude, based upon demonstrable facts, that a Swiss bank's records contained exculpatory evidence. Could he compel the Justice Department to make a request for the information? The treaty does not provide for such a procedure, but conceivably its terms might be construed to accommodate it.

This sort of question is hardly novel. United States law for years gave only the government subpoena power over United States nationals who were abroad.<sup>58</sup> The Supreme Court has not answered the question of whether the statute is constitutional in allowing compulsory process to the government only and not to a defendant.<sup>59</sup> Courts have divided over whether a prosecutor may be compelled to grant immunity to a witness shown by the defense to be essential to its case, and yet unwilling to forego the privilege against self-incrimination.<sup>60</sup> The United States-Swiss Treaty provides simply one more example of the government acquiring a right to compel testimony and evidence without a corresponding right being accorded an actual or potential defendant.

#### *Conclusion*

In sum, the treaty has proven valuable as an investigative tool, but has yet to be tested in the crucible of American trial practice. The treaty is a comprehensive and—as regards states with bank and financial secrecy

laws—pioneering effort in obtaining information for use in criminal prosecutions in the United States. One must ask, however, whether its utility will in fact prove as great as its sponsors had hoped. It is doubtful that the Swiss will dispense with the procedures that make using the treaty so cumbersome; after all, many of these procedures are simply part of the ordinary Swiss administrative procedure. American efforts to expand the treaty into the noncriminal area face Swiss resistance.

### SUBPOENAS TO UNITED STATES PERSONS CONNECTED WITH FOREIGN FINANCIAL INSTITUTIONS

The title of this section is intentionally broad and vague, for we mean to depict a range of relationships with foreign financial institutions that may invite government efforts to compel production of information about foreign financial transactions. Common to all the cases we will be discussing is this: United States authorities claim sufficient direct or indirect power over a person, natural or juridical, to compel production of evidence, and sufficient concern with the subject matter of the evidence to override any potential objection based upon the law of the foreign state where the records are located.<sup>61</sup>

*United States v. Quigg*<sup>62</sup> provides an example. Quigg was indicted for tax evasion. The government moved for issuance of a pretrial subpoena under Federal Rule of Criminal Procedure 17(c), to compel the Canadian Imperial Bank of Commerce to produce certain records located in the offices of its Bahamian subsidiary. The government also sought an order compelling Quigg to consent that the records be produced. Canadian Imperial was served by delivery of process to its New York agency office. The government claimed that this was sufficient service upon the parent corporation, with headquarters in Toronto, Ontario, Canada, and upon Canadian Imperial's branches and subsidiaries throughout the world.

The court in *Quigg* rejected Canadian Imperial's challenge to personal jurisdiction. Canadian Imperial is not a national or resident of the United States, and could not be served abroad under Federal Rule of Criminal Procedure 17(e)(2) and 28 U.S.C. § 1783. Turning to the law relating to domestic service, the court found that:

The subpoena power of the federal courts in criminal matters is not explicitly conferred by statute but derives from the general grant of jurisdiction over offenses against the United States which appears at 18 U.S.C. § 3231.<sup>63</sup>

The court held that the subpoena power is limited by the same principles that govern the exercise of *in personam* jurisdiction in civil cases. Thus, the

test was whether Canadian Imperial's activities in the United States were significant enough to satisfy the test set out in *International Shoe Co. v. Washington*.<sup>64</sup> On the undisputed facts, the court found that Canadian Imperial's activities met that test.

In *Quigg*, the records sought apparently resided in a *branch* of Canadian Imperial in Nassau, Bahamas, and service was made upon a United States office of Canadian Imperial that held itself out as resident agent of the same corporate entity of which the branch was a part. Familiar personal jurisdiction reasoning led easily to the result the court reached.

Suppose, however, that the documents resided not in a *branch* of Canadian Imperial, but in a subsidiary corporation with headquarters in the Bahamas. In fact, Canadian Imperial does have a subsidiary trust company in the Bahamas, and this company no doubt numbers among its clients a large number of Americans. Would service upon Canadian Imperial's resident agent constitute service upon the trust company? The decision would turn upon the extent to which the parent's and the subsidiary's affairs are intertwined, and questions of stock ownership, interlocking directors, management, and operations would be the determining elements. Where the parent effectively controls the operations of the subsidiary, the parent has the effective control over the subsidiary's records that triggers the obligation to produce.<sup>65</sup>

In *The Matter of Arawak Trust Company (Cayman), Ltd.*,<sup>66</sup> cited in Judge Coffin's opinion in *Quigg*, presented another variation. Arawak is a trust company operating in Georgetown, Grand Cayman. The company was thought to possess records that would be helpful to a criminal investigation. A grand jury subpoena for those records was served on Marine Midland Bank, a 28 percent stockholder of Arawak, and on a director and a former director of Arawak in the United States. Arawak did not respond to the subpoena, but the court declined to impose any sanction for non-compliance. Arawak's contacts with the United States were simply too tenuous to give the court, of which the grand jury is an arm, power over the company.

Even if a court determines that it has power over records abroad by virtue of proper service on a United States affiliate, that does not end the inquiry. Switzerland, the Bahamas, the Cayman islands, Panama and other countries have bank secrecy legislation. If the bank produces the subpoenaed records, it or its employees abroad may risk criminal prosecution or civil liability. The inquiry divides into two parts: an analysis of considerations of comity between nations, and a discussion of the privilege against self-incrimination in the transnational setting.

Strong governmental interests are at issue in a criminal investigation. The Supreme Court, in *Branzburg v. Hayes*,<sup>67</sup> has emphasized that evidentiary privileges that might prevail in the context of civil litigation must give

way when the government seeks information for the purpose of prosecuting crime. Whether this governmental purpose ought to be accorded so exalted a role as some would have it may well be questioned, and surely a detailed statement of the need for the information ought to be required before the question of comity may even be considered.<sup>68</sup> Of course, when a criminal defendant seeks information by subpoena, his right to compulsory process arises and must be given the weight to which this constitutional guaranty is entitled.<sup>69</sup>

The bank secrecy laws at issue speak in more or less clear terms, but as they are presented to courts in the process of litigation over subpoenas, their coercive and punitive aspects emerge. And however United States authorities may grumble about foreign bank secrecy laws, they do represent the acts of sovereign powers within their own territory, and deserve respect if only for that reason.

Some courts have avoided the problem by finding that the laws of the foreign country would not in fact be violated by compelled production of the records sought.<sup>70</sup> But where the conflict is clear, and the foreign law unequivocally declares the records safe from process, most courts have refused to enforce governmental subpoenas, be they grand jury or other.<sup>71</sup>

A notable exception to the general rule of judicial caution is *In Re Grand Jury Proceedings (Field)*,<sup>72</sup> in which a Caymanian bank official who happened to be in the United States was served with a grand jury subpoena and refused to testify based on Caymanian bank secrecy laws. The Fifth Circuit found that United States and Caymanian interests were directly at odds, and set out to resolve the conflict by citing the Restatement of Foreign Relations Law.<sup>73</sup> The Restatement provides that when the legal systems of two states conflict, each state should balance the respective interests at stake. It hardly seems to authorize the courts of one state to perform the balancing function unilaterally.

Proceeding to apply its balancing test, the Fifth Circuit was impressed by evidence that Cayman and other foreign bank accounts were being used to evade United States tax laws. The court also noted that even if enforcement of the subpoena were illegal, the law did not impose any constraints on the use of illegally-obtained evidence before a grand jury. The court found that if Caymanian authorities were investigating Mr. Field's bank, they could use Caymanian compulsory process to do so; what difference, the court said, could it possibly make that the investigation here was by a foreign government?

The Fifth Circuit's decision is wrong on a number of counts. First, whether or not a defendant may object to the use of illegally-obtained evidence before a grand jury is hardly relevant to the inquiry in *Field*. The question there is whether Field could be compelled, with the threat of jail for contempt, to testify even if to do so would violate the law of the place

where he lived and worked and subject him to prosecution under that law. This is a straightforward fifth amendment question, with some courts suggesting a willingness to defer to a well-founded fear of prosecution under a foreign legal system.<sup>74</sup> This puts the burden on American authorities to grant immunity from United States prosecution, and to obtain the necessary assurances from the foreign sovereign. This course not only reassures the witness, but pays decent regard to the foreign sovereign's interest in enforcement of its own law.

Second, the easy assertion that since the Caymanian authorities could find the information for their purposes, they ought not to care if the Americans do so, has no foundation in logic, experience, or international law. The Swiss bank secrecy laws yield to Swiss federal criminal investigations in most cases, but this has never meant and does not now mean that the Swiss are therefore willing to permit foreign investigators the same right to breach Swiss law whenever they decide it to be expedient. There is a crucial difference between a foreign sovereign's law relating to its own investigations, and that sovereign's attitude toward foreign investigations. That difference in attitude is an attribute of sovereignty itself, not only the power over one's own territory, but the exclusive right to determine the application of the law within that territory. One trusts that *Field* will not be followed.<sup>75</sup>

Of course, the customer's consent can eliminate much of the difficulty with foreign bank secrecy laws. If the customer is known and available, the government may seek to compel that consent. In *Quigg*, the Court analogized consent to submitting to a blood test or to fingerprinting, and ordered the defendant to yield. The problem with forced consent is two-fold: is the act of consent itself testimonial, in that it seems to concede the existence of a foreign financial interest, which may be a link in a chain of incriminatory evidence? Second, are the records that are sought testimonial? The answer to the first question may lie in artful drafting of the consent, so that it is not a concession. The second question will turn upon an analysis of the "personal" character of the records; generally, bank records are not so personal in nature as to trigger fifth amendment protection.<sup>76</sup>

So if the government is able in a trial setting to make the normal Federal Rule of Criminal Procedure 17 showing of relevance and admissibility, and in a grand jury setting to make some threshold showing of need, the compelled consent may be a sufficient answer, as to the records that would be available by such a means. Of course, to the extent that the rights of parties not before the court are involved, the consent may be unavailing to the government.<sup>77</sup>



## THE END RUN: "KIDNAPPING" INFORMATION

The briefcase episode recited in the Introduction really happened, and has been the basis for a Supreme Court decision, *United States v. Payner*.<sup>78</sup> In *Payner*, the Court focused upon the violation of the banker's fourth amendment rights during the briefcase theft. The court held that the defendant Payner lacked standing to complain of the violation of the rights of the banker, a third party. In another recent case, there have been allegations that United States investigators have induced a Caymanian police official to come to the United States and share information with a federal grand jury, although doing so is a violation of Caymanian law.<sup>79</sup>

The Department of Justice has candidly and even cynically expressed confidence that the application of rules of standing will insulate the government from application of the exclusionary rule.<sup>80</sup> At some point, perhaps in a case presenting even more deliberate government misconduct, the rules of standing may be held not to restrict a defendant's right to make a motion to suppress. But such issues of criminal procedure are not the principal concern of this article. In analyzing these end runs, we conclude that more emphasis should be given to the regime of secrecy that is deliberately undermined by such tactics.

Such conduct is a calculated affront to the sovereignty of a foreign state. The briefcase episode was perhaps not so objectionable since the banker was not waylaid until he came to the United States. However, in the same investigation a government employee did go to the Bahamas and steal papers from the banker's desk.

The rights being violated are arguably only the sovereign rights of the state whose bank secrecy—and perhaps trespass—laws are disregarded. There is no sure guide in the cases, but let us suggest paths that might be explored. The Supreme Court, prior to extending the fourth amendment exclusionary rule to the states in *Mapp v. Ohio*,<sup>81</sup> adopted rules designed to prevent federal officers from avoiding their constitutional obligations by cooperating with state police. In *Elkins v. United States*,<sup>82</sup> the Court held that a federal defendant could move to suppress evidence obtained by state police in violation of the fourth amendment. In *Rea v. United States*,<sup>83</sup> the Court permitted an injunctive action against federal officers to prevent their turning over unlawfully-obtained evidence to the state police.

Of course, in both *Elkins* and *Rea* the command being applied was that of the fourth amendment to the United States Constitution, and not that of a foreign country. A defendant or prospective defendant seeking to rely upon *Elkins* and *Rea* would have to first assure himself that he had standing to complain of the violation, and then argue for application of a rule barring federal agents from profiting by violation of foreign legal rules. In the analogous context of extradition, only the clearest violations of the

most basic rules about obtaining the defendant's body have resulted in the courts ruling against the government.<sup>84</sup>

One important element of a challenge in the United States courts would be a persuasive demonstration that the end run is a calculated and deliberate affront to the sovereignty of a foreign state. The United States regards itself as a commercial center for the world, and is or ought to be concerned with encouraging economic relations with other countries on a free and equal basis.<sup>85</sup> The cavalier attitude of United States investigators toward foreign secrecy laws reflects a sort of "banana republic" mentality that ill becomes the United States in the contemporary world. More important, perhaps, repeated or blatant American investigatory actions in bad faith may well undercut American credibility in foreign and domestic litigation over *legitimate* efforts to acquire information.

A defendant or potential defendant might also consider using the political system or judicial process in the foreign country to deter and perhaps repair violations of that country's laws. A foreign government may be willing to warn United States authorities that unless they are willing to use regular procedures for obtaining information that all channels of cooperation may be blocked. Several years ago, a British police end run in Switzerland caused considerable scandal, no doubt leading to deterrent measures.<sup>86</sup> United States persons with foreign banking connections have made informal approaches to foreign governments in order to secure such assistance in warning the Americans off.

The question of filing suit in a foreign country to secure protection under its banking laws is beset with difficulty. The lawsuit might result in disclosing more information than it could reasonably be expected to protect. In any event, a foreign lawsuit hardly seems a useful tool to restrain United States investigators. It is doubtful they would be subject to service of process by any easy means; even if they could be served, the time required to conclude the lawsuit would probably be too long for even a successful result to do any good.

There is some American precedent for suing agents of a foreign government who enter the United States and violate its laws, and for obtaining longarm personal service on those agents back in their home country.<sup>87</sup> As we say, the precedent is sketchy, but litigants may find it worthwhile to seek to apply these rules in a foreign country "invaded" by American agents.

## CONCLUSIONS

The cocktail party jokes about the Swiss (or Bahamian, or Caymanian) bank account get weaker every year, and not simply from repetition.

Negotiation, compelled production and litigation over foreign financial information have shown a dramatic increase, and continue to concern American authorities. The lawyer planning a foreign transaction must now consider not only the maze of bank secrecy legislation in the country involved, but also the probable future development of legal, nonlegal and extralegal devices for hurdling the barriers created by that legislation.

Regulation of multinational corporations requires more investigative resources, deployed over a larger area, than any given state has available to it. International exchange of information is therefore necessary. However, each state should recognize that its own view of economic and fiscal propriety, while entitled to undoubted sway within its own borders, has little if any claim to prevail over another state's view within the latter's territory.

Moreover, one engaging in a transaction in a foreign country has a legitimate reliance interest in the enforcement of that country's rules about the consequences of that transaction, including disclosure of its details to third parties. This international reliance interest is as old as the international merchant class itself.

All of this suggests that bilateral and multilateral agreements for exchange of information are preferable to the courts or prosecutors of one state indulging their own views about the way in which the respective interests of sovereigns should be accommodated. We are suggesting in short that in this field as in so many others, one should strive to create international rules, internationally conceived and enforced.

## NOTES

<sup>1</sup> See generally 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW chs. 8-9 (M. Bassiouni & V. Nanda ed. 1973) [hereinafter BASSIOUNI]; *Regina v. Governor of Brixton Prison, Ex parte Soblen*, [1963] 2 Q.B. 243 (1962).

<sup>2</sup> See generally *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001; *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

<sup>3</sup> *United States v. Payner*, 447 U.S. 727 (1980); and for a discussion of the genesis of the illegal search, see the materials cited in 447 U.S. 733 n.5. Many Freedom of Information and Privacy Act requests, 5 U.S.C. §§ 552, 552A (1980), have uncovered more information about these activities.

<sup>4</sup> See, e.g., *Payner*, 447 U.S. at 733 n.5.

<sup>5</sup> Some years ago, the Swiss press carried an account of British officials bribing two Swiss bank employees, and the matter was apparently quite disturbing to the Swiss government. See Meier, *Banking Secrecy in Swiss and International Taxation*, 7 INT'L LAW. 16, 17 n.4 (1973).

<sup>6</sup> We write from the perspective of American lawyers, faced with demands by United States officials and tribunals for assistance from foreign countries. We have faced these questions in our practice and writing, and this perspective is therefore the most congenial to ourselves and our readers. In any case, the treaties, rules of customary international law, and

issues of municipal law and policy are remarkably alike in almost the whole of the nonsocialist world.

<sup>7</sup> 15 U.S.C. § 78 (Supp. II 1978). For a discussion of the various civil, administrative and criminal consequences of the Foreign Corrupt Practices Act of 1977, see the materials in the excellent ABA-sponsored book *PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS* 431-509 (1981) [hereinafter cited as *PARALLEL INVESTIGATIONS*], and authorities there cited. For our purposes, the most significant impact of the Foreign Corrupt Practices Act of 1977 is the criminalization of certain foreign payments by United States concerns to governments or political party officials or candidates. The evidence of such transactions lies almost wholly beyond the reach of ordinary domestic criminal process, particularly when one considers the Department of Justice view that conduct of foreign subsidiaries can be reached under the Foreign Corrupt Practices Act of 1977 by invoking the aiding and abetting statute, 18 U.S.C. § 2 (1976).

<sup>8</sup> The Act took effect December 19, 1977. Pre-Act payments have been alleged by Justice Department officials to be frauds upon the citizens of the foreign country concerned and therefore reachable as mail or wire fraud, 18 U.S.C. §§ 1341, 1343. This reading of these statutes seems far-fetched, and there have been no litigated appellate cases testing it; some firms have pleaded guilty or *nolo contendere* on such allegations. However, the Department of Justice, the Internal Revenue Service, and the Securities and Exchange Commission have all investigated pre-Act payments. In the course of such investigations, a false statement about a pre-Act payment could trigger a prosecution under 18 U.S.C. § 1001, § 1621, or § 1623, depending on the context, and obstruction of the investigation could constitute a violation of 18 U.S.C. § 1503 or § 1510. Improper reporting of pre-Act payments could constitute a criminal tax violation. If the payments were part of a price-fixing or bid-rigging scheme, the government might adopt an antitrust theory. This analysis is not intended to be exhaustive, merely to suggest the Justice Department's approaches to pre-Act cases at this writing.

<sup>9</sup> In addition to broad-gauge general agreement, the United States has concluded a number of mutual assistance agreements, limited to "specific investigations of mutual interest to both countries." *PARALLEL INVESTIGATIONS*, *supra* note 7, at 853. A list of such agreements, and the countries and cases to which they apply, appears *id.* at 853-55. These treaties provide for transmission and review of requests by means similar to those described below.

<sup>10</sup> See *infra* note 12.

<sup>11</sup> E.g., *PARALLEL INVESTIGATIONS*, *supra* note 7, at 834.

<sup>12</sup> Meier, *supra* note 5, at 17-20. This discussion relies upon Meier and upon Kronauer, *Information Given for Tax Purposes from Switzerland to Foreign Countries Especially to the United States for the Prevention of Fraud and the Like in Relation to Certain American Taxes*, 30 TAX L. REV. 47 (1974). These articles, particularly Kronauer, are an admirable summary of Swiss law and of the Treaty Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Income, May 24, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2316 (Sept. 27, 1951) [hereinafter cited as *Tax Convention*].

<sup>13</sup> Meier, *supra* note 5, at 17, Kronauer, *supra* note 12, at 64 n.72.

<sup>14</sup> Meier, *supra* note 5, at 18.

<sup>15</sup> *Id.* at 19 n.16 and accompanying text.

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Kronauer, *supra* note 12, at 47, 55, 65 and n.76.

<sup>19</sup> Kronauer, *supra* note 12, at 55-64 and Meier, *supra* note 5, at 26-29 contain a survey of Swiss tax treaties.

<sup>20</sup> Kronauer, *supra* note 12, at 56-57.

<sup>21</sup> *Tax Convention*, *supra* note 12, art. 16 discussed in Kronauer, *supra* note 12, at 70-72.

22 Kronauer, *supra* note 12, at 67-68 referring to December 19, 1966 and March 26, 1969 decisions of the Swiss Federal Tax Administrator.

23 *Id.* at 70-72.

24 *Id.* at 72-75; Meier, *supra* note 5, at 37.

25 Kronauer, *supra* note 12, at 75, notes a United States Tax Court decision, R.J. Ryan, 58 T.C. 107 (1972), *appeal dismissed*, 517 F. 2d 13 (7th Cir. 1975), *cert. denied*, 412 U.S. 939 (1973), in which the court granted an order calling for depositions in Switzerland to confirm information obtained under the Tax Convention, *supra* note 12, art. 16. Kronauer expresses doubt that the Swiss would comply with the request for assistance. We note that requests for information under the Tax Convention may trigger rights to notice and to judicial review in Switzerland, see Kronauer, *supra* note 12, at 76-78, similar to those available under the Mutual Assistance Treaty discussed *infra*.

26 Kronauer, *supra* note 12, at 51.

27 *Id.* at 51.

28 This principle of specialty is a familiar one in the context of extradition. It has long been a principle of customary international law that a demanding state may prosecute a fugitive only for the offense for which he was extradited. Indeed, specialty has been recognized as of such importance in American law that a prisoner charged with a crime other than that for which he was extradited may move to dismiss the case. *United States v. Rauscher*, 119 U.S. 407 (1886); see *supra* note 1.

29 Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 (January 23, 1977). [Hereinafter cited as Mutual Assistance Treaty.]

30 *Id.*

31 Article 4, para. 2 of the Mutual Assistance Treaty limits coverage to offenses that are such under the laws of both states and are listed in the Schedule. This is the familiar principle of double criminality or double incrimination. See BASSIOUNI, *supra* note 1. An exception is made for certain gambling offenses in the Schedule, item 26. Although obstruction of justice is listed in the Schedule, Swiss law does not recognize obstruction as a crime to the same extent as American law and the Swiss have refused assistance in some unsupported obstruction cases.

32 This again is a familiar principle, see BASSIOUNI, *supra* note 1, as is the exclusion of military and conscription offenses.

33 This language should be familiar to American lawyers, as it bears some resemblance to the definitions of organized crime and "racketeering" that abound in the legislative history of the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. § 1961-1968 (1976).

34 Mutual Assistance Treaty, *supra* note 30, arts. 6-8, spell out the special organized crime procedures.

35 *Id.*, art. 7, para. 2(c).

36 The message was dated August 28, 1974, though the Treaty was not approved until July 27, 1976. Message du Conseil federal a L'Assemblée federale concernant le Traite d'entraide judiciaire en matiere penale conclu avec les Etats-Unis d'Amerique, August 28, 1974, Feuille Federale 1974 II 582 [hereinafter Federal Council Message]. The approval date appears in, e.g., T.I.A.S. No. 8302. All translations are the authors'.

37 *Id.*

38 Mutual Assistance Treaty, *supra* note 30, discussed in Federal Council Message, *supra* note 36.

39 Federal Council Message, *supra* note 36 (referring to Mutual Assistance Treaty art. 3).

40 *Id.*

41 Mutual Assistance Treaty, *supra* note 30, art. 40(8).

42 Loi federale relative au traite conclu avec les Etats-Unis d'Amerique sur l'entraide

judiciaire en matiere penale, 1977 1 Recueil officiel des lois et ordonnances de la Confédération suisse [ROLF] 17 [hereinafter cited as *Loi re traite*] article 16 gives to every person with "an interest worthy of being protected" the right to intercede. Swiss law prior to the treaty, both statutory and decisional, upholds the conclusion in the text. See Kronauer, *supra* note 12, at 76-78 and authorities cited; *Loi federale sur la procedure administrative*, as referred to in *Loi re traite*, arts. 16-18. In a recent, but unpublished case, the Conseil Federal upheld the right of suspects to intercede and obtain a decision on the merits of fulfilling a request under the treaty. *X v. Departement de justice et police*, Conseil Federal, Feb. 11, 1981.

<sup>43</sup> *Loi re traite*, arts. 16-18 permit judicial review at the instance of anyone with a right to participate in the administrative process.

<sup>44</sup> Kronauer, *supra* note 12, at 77 says "it seems obvious" that such interests should be protected and, although he is speaking of the tax treaty, his observation is well taken. Nonetheless, neither his research nor ours have uncovered any decision by a Swiss or American court interpreting either treaty to require such notice. The Swiss cases are, however, quite definite that if a suspect finds out about the request the right to intervene is guaranteed. See *supra* note 42.

<sup>45</sup> Mutual Assistance Treaty, *supra* note 30, art. 18(5).

<sup>46</sup> *Id.*, arts. 16, 19.

<sup>47</sup> FED. R. EVID. 801, 802, 803 (hearsay); 901, 902, 903 (authentication). It would be an act of supererogation and a waste of time to rehearse the confrontation and compulsory process issues in any detail. See, Westen, *Confrontation and Compulsory Process: Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Westen, *Compulsory Process II*, 74 MICH. L. REV. (1975); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974).

<sup>48</sup> The Federal Rules of Evidence withhold "self-authenticating" status from foreign nonpublic documents, no doubt due to concerns with genuineness in such cases. See FED. R. EVID. 902(3). The American official who obtains the documents has no personal knowledge of their genuineness and thus cannot authenticate them. When there is a serious question about the meaning, completeness and even accuracy of bank records obtained under the Treaty on Mutual Assistance in Criminal Matters, it hardly seems possible that the government will be able to sustain its burden of showing the records to qualify for business records status without calling a witness with personal knowledge who can sponsor them. Consider a typical case in which a Swiss bank was used as a depository for bonds held on behalf of a defendant corporation by an agent or "middleman." The meaning and reliability of particular entries on statements of account, or upon debit or credit memoranda, are not reliably knowable unless a percipient live witness testifies about them.

<sup>49</sup> Such excisions would raise questions under FED. R. EVID. 106, the "rule of completeness," and also perhaps under the public trial and confrontation clauses. See *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950). The Swiss are aware of some of these problems. Federal Council Message, *supra* note 32, at 5.

<sup>50</sup> *Loi re traite*, arts. 16-18, 1977 1 ROLF 17, 24-25.

<sup>51</sup> Mutual Assistance Treaty, *supra* note 30, art. 38(3).

<sup>52</sup> The government might also seek a waiver of confidentiality rights by such a person.

<sup>53</sup> These are Mutual Assistance Treaty *supra* note 30, art. 9, para. 2 (search and seizure must be executed according to the law of the place of execution); art. 10, para. 1 (self-incrimination protection); art. 13 (presence of suspect and counsel during certain phases); art. 18, para. 7 (exclusion from evidence of non-genuine document); art. 25, para. 1 (self-incrimination protection); art. 26 (interrogation of persons in custody); art. 27 (safe conduct).

<sup>54</sup> The question whether a treaty confers individual rights is decided from its history and language. See, e.g., *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981).

<sup>55</sup> *United States v. Rauscher*, 119 U.S. 407 (1886). However, an exchange of letters under the Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzer-

land, 27 U.S.T. 2128-2138, T.I.A.S. No. 8302 (January 23, 1977), states that violation of the principle of specialty as in art. 5, para. 1, does not permit exclusion of the evidence in the requesting state. The Swiss agree that the person has no standing to seek suppression of the evidence in the requesting state but rather may inform the requested states and ask that it take action. This language remains to be tested.

<sup>56</sup> See, *supra* note 47.

<sup>57</sup> See, *supra* note 48.

<sup>58</sup> See Westen 73 MICH. L. REV. 71, 178 n.501 (1974).

<sup>59</sup> See *United States v. Blackmer*, 284 U.S. 421 (1932). Section 1783 was amended in 1964, see 28 U.S.C. § 1783 (1976).

<sup>60</sup> See *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied* 449 U.S. 1077.

<sup>61</sup> Since our article is limited to criminal investigations, we do no more than note that similar problems to those we address may arise in civil, civil tax, securities regulation and other non-criminal contexts. See, e.g., *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981) (tax) U. S. appeal pending; *SEC v. Banca Della Svizzera Italiana*, 941 F.2d 1324 (9th Cir. 1991) (securities regulation). It bears noting that dictum in Judge Pollack's opinion in the latter sweeps rather broadly and discusses a number of issues relevant to obtaining information in criminal cases.

<sup>62</sup> 81-2 T.C. 9732 (1981).

<sup>63</sup> *Id.* at 88, 466-67.

<sup>64</sup> 326 U.S. 310 (1945). On the question of *in personam* jurisdiction, see also *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968).

<sup>65</sup> See *Local No. 1419, I.L.A., General Longshore Workers Union, AFL-CIO v. Smith*, 301 F.2d 791 (5th Cir. 1962); *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 257 (D. Del. 1979); *Standard Ins. Co. of New York v. Pittsburgh Elec. Insulation, Inc.*, 29 F.R.D. 185 (W.D. Pa. 1961).

<sup>66</sup> 489 F.Supp. 162 (E.D.N.Y. 1980).

<sup>67</sup> 408 U.S. 665 (1972).

<sup>68</sup> See *In re Grand Jury Impaneled January 21, 1975* (Freedman), 529 F.2d 543 (3d Cir. 1976); *In re Grand Jury Proceedings* (Schofield), 507 F.2d 963 (3d Cir. 1975), *cert. denied*, 121 U.S. 1015; *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85 (3d Cir. 1973).

<sup>69</sup> See the articles by Westen, *supra* note 47.

<sup>70</sup> *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968); *First Nat'l City Bank of New York v. Internal Revenue Service*, 271 F.2d 616 (2d Cir. 1959).

<sup>71</sup> See *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960).

<sup>72</sup> 532 F.2d 404 (5th Cir. 1976).

<sup>73</sup> *Limitations on Exercise of Enforcement Jurisdiction*.

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as (a) vital national interests of each of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person, (c) the extent to which the required conduct is to take place in the territory of the other state, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1962).

Rather than unilaterally balancing these interests, the court might well have insisted that the government seek the information it wanted by letters rogatory issued under 28 U.S.C. § 1781 (1976). While letters rogatory are most commonly used in civil cases, see generally 8 C.

WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2083 (1970) (regarding depositions in foreign countries), they have been used in criminal cases. The issues of letters rogatory would permit the foreign sovereign a voice in the determination whether particular information ought to be produced. Another way of accommodating the different interests of the two sovereigns would be a bilateral treaty concerning a particular investigation.

<sup>74</sup> On the foreign self-incrimination issue, see *In re* Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979); *United States v. Yanagita*, 552 F.2d 940, 946 (2d Cir. 1977); *In re* Grand Jury Subpoena of Flanagan, 30 CRIM. L. REP. (BNA) 2471 (E.D.N.Y. 1982).

<sup>75</sup> *But see* *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981) *appeal pending*; SEC v. Banca Della Svizzera Italiana, 941 FED. SEC. L. REP. (CCH) ¶98,346 (S.D.N.Y. 1981), *supra* note 61. In the latter case, Judge Pollack's opinion does speak broadly. However, the Swiss bank in that case had knowingly penetrated American securities markets on behalf of its clients, aware of the reporting requirements of American law in the event that a given client should acquire more than a certain percentage of the stock of a public corporation. Under those circumstances it is not difficult to see why Judge Pollack should say repeatedly that the bank had itself created the necessity for the investigation in which it sought to withhold its cooperation.

<sup>76</sup> *See generally* *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981), U.S. *appeal pending* (provides an excellent discussion of the privilege).

<sup>77</sup> The FED. R. CRIM. P. 17 showing referred to is that in *United States v. Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952), *cited with approval* in *United States v. Nixon*, 418 U.S. 683, 699 (1974). The customer may be a foreign entity who was used by a domestic person to accomplish a particular transaction. The domestic person may not have the requisite control to make a consent operative as a matter of the foreign law, or may not have such control as to permit a United States court to seek to compel disclosure by acting against the domestic person. As to the former question, the foreign law must be looked to. *See* FED. R. CIV. P. 44.1.

<sup>78</sup> 447 U.S. 727 (1980). For the facts of *Payner*, see *supra* text accompanying note 3.

<sup>79</sup> *United States v. Mapco, Ltd.*, No. 79-62 (S.D. Tex. filed April 30, 1979).

<sup>80</sup> Several memoranda dealing with these problems have been unearthed by FOIA requests. *See, e.g.*, Internal Revenue Service Memorandum on file with MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES.

<sup>81</sup> 367 U.S. 643 (1961).

<sup>82</sup> 364 U.S. 206 (1960).

<sup>83</sup> 350 U.S. 214 (1956).

<sup>84</sup> *See* BASSIOUNI, *supra* note 1, chs. 8-9; *cf. Rauscher*, 119 U.S. 407; *Regina v. Governor of Brixton Prison, Ex parte Soblen* [1963] 2 Q.B. 243 (1962).

<sup>85</sup> Doubtless the use of foreign corporations to facilitate federal crime is not to be encouraged. On the other hand it is desirable to maintain the United States as a center for commerce throughout the world. Since the relations of this country with the rest of the world are involved, it is appropriate that Congress and not a court should resolve the conflicting considerations. If the criteria for subpoenaing a foreign corporation before a grand jury are to be less stringent than those applicable to a civil summons, Congress should make that judgment. It has not explicitly done so. This court will therefore presume that a foreign corporation is "in" the United States for purposes of service of a grand jury subpoena only to the extent that it would be subject to comparable civil process.

*In re* Arawak Trust Co. (Cayman) Ltd., 489 F.Supp. 162, 165 (E.D.N.Y. 1980).

<sup>86</sup> *See supra* note 5.

<sup>87</sup> *See* *Letelier v. Republic of Chile*, 488 F.Supp. 665, 666 (D.D.C. 1980), 502 F.Supp. 259 (D.D.C. 1980).